A

Davis ak Mering & Anor v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(SH)-425–11 OF 2021
RAVINTHRAN, CHE MOHD RUZIMA AND AZMI ARIFFIN JJCA
27 MARCH 2022

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Conviction under s 26J of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, read together with s 34 of Penal Code — High Court judge found accused persons guilty and sentenced accused persons to three years' imprisonment — Whether accused persons had common intention of transporting*
D *migrants — Whether High Court Judge erred in failing to consider depositions made by migrants — Whether migrants' depositions implicated that accused persons had smuggled them — Whether migrants had voluntarily entered the country — Whether migrant's depositions exonerated accused from offence committed*

E

While manning a roadblock, PW2 together with his team had stopped and conducted a search towards a vehicle Toyota Hilux at an illegal route at Jalan John, Lubov Antu, Sarawak. It was found that both the accused were conveying three smuggled migrants from Indonesia namely, Salbiah, Karwono and Nani
F Setiawati. The three migrants walked on foot from the Indonesia border entering the Malaysian border through Lubok Antu, Sarawak via the illegal and ungazetted route and met both the accused at an oil palm estate. Based on the depositions taken from the migrants, the reason they entered Sarawak was in search of the employment opportunity offered by the accused(s) in the said oil
G palm estate. Later in the day, both the accused conveyed them in the Toyota Hilux belonging to PW1 (brother-in-law of the first accused and the son-in-law of the second accused) and all of them were arrested at an illegal route at Jalan John, Batu Kaya, Lubok Antu when they were about to exit from Malaysia to Indonesia. The said route was only about 400–500meters from the
H Malaysia-Indonesia border. Following this, the appellants were jointly tried with a charge under s 26J Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, read together with s 34 of the Penal Code. The appellants claimed trial to the charge. Both accused, in their defence, contended that: (a) both accused were already at the oil palm estate when the migrants arrived;
I (b) it was by way of coincidence that both accused met the migrants again in the evening at Lubok Antu and the migrants asked if both the accused could help to send them back to the oil palm estate; (c) both accused had no knowledge that the migrants had no valid travelling documents; and (d) they did not facilitate the unlawful exit of the smuggled migrants from Malaysia to

Indonesia. At the end of the trial, the High Court judge found the two appellants guilty on the charge and sentenced both the accused to three years' imprisonment to run with immediate effect. Aggrieved by the said decision, the appellants appealed against the conviction and sentence. The issues that arose for determination were: (i) whether both the accused in furtherance of common intention being the operator of Toyata Hillux engaged in the conveyance of smuggled migrants; and (ii) whether the trial judge failed to adequately consider the defence of the accused.

Held, affirming the conviction and sentence:

(1) The court was not persuaded by the accused(s) submission that the three migrants in their depositions did not implicate or ever mentioned that the two accused had smuggled the three of them into or out of the country as all three of them had voluntarily entered this country, and therefore no offence being committed. The act of the accused in transporting and conveying the three migrant fell clearly within the definition of 'smuggling of migrants' which meant: (a) arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in para (a). There was sufficient evidence to show that the accused persons were actively involved in conveying the three migrants into Malaysia via the illegal route (see paras 30–32).

(2) There were ample evidence connecting the two accused with the crime. Inference could be drawn that both the accused knew that the migrants' act of entering and exiting Malaysia were via the illegal route and the meeting at the estate was a pre-arranged plan orchestrated by both the accused. If it was not because of the work employment opportunity offered by the second accused and the inducement and promise made by the second accused that she would arrange their passport if the migrants agreed to work with her at the said palm oil estate, the migrants would not have agreed to entered Lubok Antu, Sarawak unlawfully. The assistance given by the accused conveying them for easy movement in Lubok Antu area further strengthened the prosecution's case that the accused had directly engaged in conveyance of the smuggled migrants by using the said vehicle (see para 33).

(3) Even though the three-migrant admitted in their depositions that they had voluntarily entered Malaysia, they did exonerate the two accused from the offence committed. This was because voluntariness/consent was not one of the elements to be proven for an offence under s 26J of the

Anti-Trafficking in Persons and Anti- Smuggling of Migrants Act 2007. Hence, the issue of consent was immaterial. Regardless of the reasons given by the migrants, it did not legalise their act of entering Malaysian border without any lawful documents and the accused conduct of conveying them into Malaysia without proper and lawful means (see para 34).

(4) The inference of the accused involvement could be gathered from: (a) PW's testimony, that his vehicle was borrowed by the first accused and used by the him to enable him to travel on a rough road to the oil palm estate with the second accused; (b) the fact that both the accused were caught in action while conveying the smuggled migrants and being the operator of the said vehicle; and (c) the meeting between both the accused and the migrants took place at the oil palm estate. They were not there but accident or coincidence. There was more than credible evidence that could be inferred that the accused acted in concert in the commission of the offence in furtherance of that common intention (para 40).

(5) The High Court Judge ('trial judge') had judicially considered the defence advanced by the accused persons and weigh all their evidence including the depositions statements of the three migrants before coming to a definite finding of fact. It was clear from the judgment that trial judge had addressed his mind to the defence, placed significance emphasis to it, meticulously considered the accused versions and adequately explained why he chose to disbelieve the evidence of the defence. The trial judge was right when he finally made a strong finding of fact that the defence to be a mere denial and had not been able to raise any reasonable doubt in his mind. He had the advantage of seeing and hearing the witnesses. Hence, there was no reason to interfere with the trial judge's finding of facts as there were no infirmities in the decision of the trial judge (see paras 44–46).

(6) The findings were premised on the credibility of witnesses which was within the domain of the trial judge. Therefore, the conviction of both the accused were safe. On the issue of sentence, it was obvious that the seriousness of the crime committed by the accused must never be taken lightly. The aggravating factor outweighed the mitigating factors. The sentences imposed were not wrong either in law or that they were manifestly excessive or inadequate on the facts and in the circumstances of the case. Hence, the sentence meted out by the trial judge was affirmed (see paras 47–48).

[Bahasa Malaysia summary

Semasa mengawal sekatan jalan raya, SP2 bersama pasukannya telah memberhentikan dan melakukan carian di atas kenderaan Toyota Hilux di

laluan haram di Jalan John, Lubov Antu, Sarawak. Mereka kemudiannya mendapati kedua-dua tertuduh membawa tiga orang pendatang asing tanpa izin dari Indonesia iaitu Salbiah, Karwono dan Nani Setiawati. Ketiga-tiga pendatang asing itu berjalan kaki dari sempadan Indonesia memasuki sempadan Malaysia melalui Lubok Antu, Sarawak melalui laluan haram yang tidak diwartakan dan bertemu kedua-dua tertuduh di sebuah ladang kelapa sawit. Berdasarkan keterangan yang diambil daripada pendatang-pendatang asing tersebut, mereka memasuki Sarawak adalah untuk mencari peluang pekerjaan yang ditawarkan oleh tertuduh-tertuduh di ladang kelapa sawit tersebut. Kemudian pada hari tersebut, kedua-dua tertuduh membawa mereka di dalam Toyota Hilux milik SP1 (abang ipar tertuduh pertama dan menantu tertuduh kedua) dan kesemua mereka ditangkap di laluan haram di Jalan John, Batu Kaya, Lubok Antu ketika mereka hendak keluar dari Malaysia ke Indonesia. Laluan tersebut hanya kira-kira 400–500 meter dari sempadan Malaysia-Indonesia. Berikutan itu, perayu telah dibicarakan bersama dengan pertuduhan di bawah Akta Pencegahan Pemerdagangan Orang dan Anti-Penyeludupan Migran 2007 yang dibaca bersama dengan s 34 Kanun Keseksaan. Perayu-perayu memohon untuk dibicarakan terhadap pertuduhan itu. Kedua-dua tertuduh dalam pembelaan mereka berhujah bahawa: (a) kedua-dua tertuduh sudah berada di ladang kelapa sawit apabila pendatang asing tersebut tiba; (b) adalah secara kebetulan bahawa kedua-dua tertuduh bertemu dengan pendatang asing tersebut sekali lagi pada waktu petang di Lubok Antu dan pendatang asing tersebut bertanya sama ada kedua-dua tertuduh boleh membantu menghantar mereka kembali ke ladang kelapa sawit; (c) kedua-dua tertuduh tidak mengetahui bahawa pendatang asing tersebut tidak mempunyai dokumen perjalanan yang sah; dan (d) mereka tidak membantu pendatang asing tersebut untuk keluar secara haram dari Malaysia ke Indonesia. Pada akhir perbicaraan, hakim Mahkamah Tinggi mendapati kedua-dua perayu itu bersalah atas pertuduhan itu dan menjatuhkan hukuman penjara tiga tahun ke atas kedua-dua tertuduh dari tarikh hukuman. Terkilan dengan keputusan tersebut, perayu merayu terhadap sabitan dan hukuman tersebut. Isu-isu yang timbul untuk penentuan ialah: (i) sama ada kedua-dua tertuduh mempunyai niat bersama sebagai pemandu Toyata Hillux terlibat dalam penyeludupan pendatang asing; dan (ii) sama ada hakim perbicaraan gagal mempertimbangkan pembelaan tertuduh dengan sewajarnya.

Diputuskan, mengekalkan sabitan dan hukuman:

(1) Mahkamah tidak mempercayai hujahan tertuduh bahawa ketiga-tiga pendatang asing tersebut dalam keterangan mereka tidak melibatkan atau menyebut bahawa kedua-dua tertuduh telah menyeludup ketiga-tiga mereka masuk atau keluar dari negara ini kerana ketiga-tiga mereka secara sukarela memasuki negara ini, dan oleh itu tiada kesalahan dilakukan. Tindakan tertuduh dalam membawa dan menghantar ketiga-tiga pendatang asing itu jelas termasuk dalam definisi

'penyeludupan migran' yang bermaksud: (a) mengatur, memudahkan atau merancang, secara langsung atau tidak langsung, kemasukan seseorang secara tidak sah ke dalam atau melalui, atau pengeluaran seseorang secara tidak sah dari mana-mana negara yang orang itu bukan warganegara atau pemastautin tetap sama ada dengan mengetahui atau mempunyai sebab untuk mempercayai bahawa kemasukan atau pengeluaran orang itu adalah tidak sah; dan (b) merekrut, mengangkut, memindahkan, menyembunyikan, melindungi atau menyediakan apa-apa bantuan atau perkhidmatan bagi tujuan melaksanakan perbuatan yang disebut dalam perenggan (a). Terdapat keterangan yang mencukupi untuk menunjukkan bahawa tertuduh-tertuduh terlibat secara aktif dalam membawa ketiga-tiga pendatang ke Malaysia melalui laluan haram (lihat perenggan 30–32).

(2) Terdapat keterangan yang mencukupi yang mengaitkan kedua-dua tertuduh dengan jenayah itu. Kesimpulan boleh dibuat bahawa kedua-dua tertuduh tahu bahawa tindakan pendatang masuk dan keluar dari Malaysia melalui laluan haram dan pertemuan di ladang kelapa sawit merupakan satu rancangan yang telah diatur oleh kedua-dua tertuduh. Jika bukan kerana peluang pekerjaan yang ditawarkan oleh tertuduh kedua dan dorongan serta janji yang dibuat oleh tertuduh kedua bahawa dia akan menguruskan pasport mereka sekiranya pendatang asing tersebut bersetuju untuk bekerja dengannya di ladang kelapa sawit tersebut, pendatang asing tersebut tidak akan bersetuju untuk memasuki Lubok Antu, Sarawak secara tidak sah. Bantuan yang diberikan oleh tertuduh-tertuduh untuk membawa mereka masuk di kawasan Lubok Antu mengukuhkan lagi kes pendakwaan bahawa tertuduh telah terlibat secara langsung dalam penyeludupan pendatang asing dengan menggunakan kenderaan tersebut (lihat perenggan 33).

(3) Walaupun ketiga-tiga pendatang asing tersebut mengaku dalam keterangan deposisi mereka bahawa mereka telah memasuki Malaysia secara sukarela, mereka membebaskan kedua-dua tertuduh daripada kesalahan yang dilakukan. Hal ini kerana kesukarelaan/persetujuan bukanlah salah satu elemen yang perlu dibuktikan bagi kesalahan di bawah s 26J Akta Antipemerdagangan Orang dan Pencegahan Penyeludupan Migran 2007. Oleh itu, isu persetujuan adalah tidak penting. Tanpa mengira alasan yang diberikan oleh pendatang asing tersebut, ianya tidak mewajarkan tindakan mereka memasuki sempadan Malaysia tanpa sebarang dokumen yang sah dan perbuatan tertuduh-tertuduh membawa mereka ke Malaysia tanpa cara yang betul dan sah (lihat perenggan 34).

(4) Penglibatan tertuduh boleh dilihat daripada: (a) keterangan SP, bahawa kenderaannya dipinjam oleh tertuduh pertama dan digunakan olehnya untuk membolehkannya melakukan perjalanan di jalan yang kasar ke

ladang kelapa sawit bersama tertuduh kedua; (b) fakta bahawa kedua-dua tertuduh telah ditangkap ketika berlakunya aktiviti penyeludupan pendatang asing tersebut dan ketika menjadi pengendali/pemandu kenderaan tersebut; dan (c) pertemuan antara kedua-dua tertuduh dan pendatang asing tersebut berlaku di ladang kelapa sawit. Mereka bukanlah di sana secara kebetulan. Terdapat lebih dari keterangan yang boleh dipercayai yang boleh disimpulkan bahawa tertuduh-tertuduh bertindak secara bersesama dalam melakukan kesalahan itu (lihat perenggan 40).

(5) Hakim Mahkamah Tinggi ('hakim perbicaraan') telah mempertimbangkan pembelaan yang dikemukakan oleh tertuduh-tertuduh dan menimbang semua keterangan mereka termasuk kenyataan keterangan ketiga-tiga pendatang asing tersebut sebelum mencapai penemuan fakta. Adalah jelas daripada penghakimannya bahawa hakim perbicaraan telah mengarahkan fikirannya kepada pembelaan, meletakkan penekanan penting kepadanya, mempertimbangkan dengan teliti versi tertuduh-tertuduh dan menjelaskan dengan secukupnya mengapa dia memilih untuk tidak mempercayai keterangan pembelaan. Hakim perbicaraan betul apabila dia akhirnya membuat penemuan fakta yang kukuh bahawa pembelaan itu hanya penafian semata-mata dan tidak menimbulkan sebarang keraguan munasabah. Beliau mempunyai kelebihan untuk melihat dan mendengar keterangan saksi-saksi. Oleh itu, tiada sebab untuk mengganggu penemuan fakta hakim perbicaraan kerana tiada kekhilafan dalam keputusan hakim perbicaraan (lihat perenggan 44–46).

(6) Penemuan itu berdasarkan kredibiliti saksi-saksi yang berada dalam mahkamah hakim perbicaraan. Oleh itu, sabitan kedua-dua tertuduh adalah selamat. Mengenai isu hukuman, jenayah yang dilakukan oleh tertuduh adalah serius dan tidak boleh dipandang ringan. Faktor-faktor pemberatan melebihi faktor-faktor mitigasi. Hukuman yang dikenakan adalah betul sama ada dalam undang-undang dan ianya tidak berlebihan dan mencukupi berdasarkan fakta dan keadaan kes. Oleh itu, hukuman yang dijatuhkan oleh hakim perbicaraan dikekalkan (lihat perenggan 47–48).]

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] 1 CLJ 540, SC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 1 CLJ 138; [1983] CLJ (Rep) 721, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP & another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)

Farose bin Tamure Mohamad Khan v PP & other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

A *Herchun Singh & Ors v PP* [1969] 2 MLJ 209; [1969] MLRA 382, FC (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
PP v Azman bin Ismail & Ors [2007] 10 CLJ 469; [2007] 3 MLJ 628, HC (refd)
B *PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 2 MLRA 590, FC (refd)
PP v Norazam Ibrahim [2006] 8 CLJ 462, HC (refd)
PP v Roslizam bin Abdul Azis & Anor [2005] 1 MLJ 261; [2004] CLJU 196; [2004] 1 LNS 19, HC (refd)
C *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117; [1975] 1 LNS 195; [1975] 1 MLRA 322, PC (refd)
Ye Wei Gen v PP [1999] 4 SLR 101, HC (refd)

D **Legislation referred to**

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 26J
Penal Code s 34

E **Appeal from:** *PP v Davis ak Mering & Anor* [2021] MLJU 3078 (High Court, Kuching)

(Sia, Trabawan & Co) for the appellant.
Ronie ak Entili (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.
F

Azmi Ariffin JCA:

INTRODUCTION

G **[1]** The appellants were jointly tried in the High Court at Kuching, Sarawak with a charge under s 26J of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, read together with s 34 of the Penal Code.

H THE CHARGE

[2] The charge preferred against the appellants reads as follows:

I That you, jointly, on the 21st of July 2019, at about 1730 hours, at Jalan John, Batu Kaya, in the district of Lubok Antu, in the state of Sarawak, in furtherance of common intention, as the operators of the vehicle Toyota Hilux Double Cab with the registration number QRD 8533, that involved in the transportation of smuggling the following migrants;

(i) Salbiah (Female, Age: 32 years old), Indonesian (Passport No);

(ii) Karwono (Male, 26 years old), Indonesian (Passport No); and,

(iii) Nani Setiawati (Female, 15 years old), Indonesian (Passport No);

and that you have thereby committed an offence punishable under section 26J Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, read together with Section 34 of the Penal Code.

[3] The appellants claimed trial to the charge.

[4] In support of its case the prosecution called four witnesses.

[5] At the end of the prosecution case, the learned High Court judge found that the prosecution has succeeded in establishing a prima facie against the appellants and called upon them to enter their defence on the charge. They elected to give evidence on oath.

[6] At the end of the trial, the learned High Court judge found the two appellants guilty on the charge. Both the appellants were sentenced to three years' imprisonment and the sentence were ordered to run with immediate effect.

[7] Aggrieved by the said decision, on 3 January 2023, the appellants mounted this appeal against both the conviction and sentence.

[8] We will for convenience in this appeal, refer the two appellants in the manner they were referred to in the High Court.

THE PROSECUTION'S CASE

[9] We shall now briefly lay out the background facts leading to the charge.

[10] On 21 July 2019, at about 5.30pm while manning a roadblock at Jalan John, Batu Kaya, Lubok Antu, PW2 (Mohamad Hasbullah bin Ramli) ie the complainant together with his team had stopped and conducted a search towards a vehicle Toyota Hilux registration No QRD 8533 at an illegal route at Jalan John, Lubov Antu, Sarawak. It was found that both the accused were conveying three smuggled migrants from Indonesia namely: Salbiah, Karwono and Nani Setiawati.

[11] The three migrants walked on foot from the Indonesia border entering into Malaysia border through Lubok Antu, Sarawak via the illegal and un*gazette*d route ('jalan tikus') and met both the accused at an oil palm estate allegedly owned by the accused(s).

[12] Based on the depositions taken from the migrants, the reason they entered Sarawak was in search of the employment opportunity offered by the accused(s) in the said oil palm estate. Hence, they met the accused(s) there to view the said oil palm estate.

[13] Later in the day, both the accused conveyed them in the Toyota Hilux belonged to PW1 (brother-in-law of the first accused and the son-in-law of the second accused) and all of them were arrested at an illegal route at Jalan John, Batu Kaya, Lubok Antu when they were about to exit from Malaysia to Indonesia. The said route is only about 400–500meters from the Malaysia-Indonesia border.

THE DEFENCE'S CASE

[14] Both accused were already at the oil palm estate when the migrants arrived.

[15] The second accused ('DW2') knew one of the migrants by the name of Salbiah.

[16] It was Salbiah and her husband who were interested to work at the estate and asked DW2 if she needs workers. DW2 told the migrants that if they have a passport, she would apply for their work permits.

[17] Salbiah told DW2 that she wanted to go shopping at Lubok Antu and since both accused were also heading to Lubok Antu for their lunch, they agreed to give the migrants a lift.

[18] It was by way of coincidence that both accused met the migrants again in the evening at Lubok Antu and the migrants asked if both the accused can help to send them back to the oil palm estate as Salbiah informed them that they left their motorcycle at the Indonesian border. Both the accused agreed to send the migrants back to the border area as it was already late in the evening and getting darker.

[19] Both accused had no knowledge that the migrants had no valid travelling documents.

[20] Both accused denied that they facilitated the unlawful exit of the smuggled migrants from Malaysia to Indonesia. Both did not know whether the route they used during the conveying of the migrants is illegal because that is the road leading to their oil palm estate.

THE RELEVANT PROVISIONS OF LAW

(a) s 2 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 defines the following:

> 'smuggled migrant' means a person who is the object of the act of the smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants:
>
> 'conveyance' means any vehicle, vessel, ship, aircraft, or any other mode of transport whether by air, sea or land;
>
> 'smuggling of migrants' means —
>
> (b) arranging facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful and
>
> (c) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a);

(a) s 26J of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM 2007') provides that:

> Offence of conveyance of smuggled migrants
>
> Any person being the owner, operator or master of any conveyance who engages in the conveyance of smuggled migrants commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding five years and shall also be liable to a fine not exceeding two hundred and fifty thousand ringgit, or both.

(b) s 34 of the Penal Code provides that:
Each of several persons liable for an act done by all, in like manner as if done by him alone.

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

MAIN ISSUE FOR DETERMINATION

(a) whether both the accused in furtherance of common intention being the operator of Toyata Hillux registration No QRD 8533 engaged in the conveyance of smuggled migrants namely Salbiah, Karwono and Nani Setiawati; and

(b) whether the learned trial judge failed to adequately consider the defence of the accused.

A THE LAW ON APPELLATE INTERVENTION

[21] The law on the appellate intervention is quite settled. An appellate court should be slow in disturbing the findings of facts arrived by the trial court who had the advantage of seeing and hearing the witnesses, unless there are substantial and compelling reasons for disagreeing with the finding.

[22] In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; [1969] MLRA 382, Ong Hock Thye CJ (as he then was) said as follows:

> An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding.

[23] In *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117; [1975] 1 LNS 195; [1975] 1 MLRA 322, the Privy Council held:

> (1) as in this case the learned trial judge had based his finding on the evidence of the plaintiff and his witness, his finding should not have been disturbed;
>
> (2) this was not one of those rare cases where an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

[24] In *Ye Wei Gen v Public Prosecutor* [1999] 4 SLR 101, Yong Pung How CJ (as he then was) said:

> It is trite law that an appellate court will be slow to overturn the trial judge's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him ... These cases thus stand for the principle that findings of fact by the trial judge are prima facie correct unless there are very good grounds for disturbing them.

[25] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor & another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737 the Federal Court held as follows:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that is his finding of facts. It should go further and examine the evidence and the circumstances. Under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case 'there re-substantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

[26] In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 2 MLRA 590, the Federal Court held as follows:

> Now, it settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its awn findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious an appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

OUR DECISIONS

[27] It is clear beyond doubt from PW1's testimony that he has borrowed the said vehicle to the first accused on 21 July 2019 in order to allowed him to go to the oil palm because his car was not able to enter the plantation as the road going to the oil plantation was bumpy and lot of potholes.

[28] PW2 testified in his witness statement that both the accused were arrested conveying the smuggled migrant in the said vehicle. PW2 said as follows:

> 3. Pada 21.07.2019 jam lebih kurang 1730 hrs, semasa saya sedang membuat sekatan di Jalan John (GR425165) bersama anggota saya yang lain seperti berikut:
>
> (i) 1183133 Kpl Mohamad Haikal Asyraf Bin Halim Yatim;
>
> (ii) 1188843 L/Kpl Muhammad Amirul Bin Sabri;
>
> (iii) 1195978 PBT Muhammad Syierad Bin Shahreen;
>
> (iv) 1196189 PBT Hafizuddin Bin Ahmad Tarmizi;
>
> (v) 1195973 PST Muhamad Fitri Bin Rosdi; dan
>
> (vi) anggota Tentera Nasional Indonesia-Angkatan Darat (TNI-D) 31081638290387 PRK Andik Raharja; dan
>
> (vii) 3170360080195 PRD Kapitone;
>
> telah menahan dan membuat pemeriksaan ke atas sebuah kenderaan jenis Toyota Hilux berwarna putih dengan nombor pendaftaran QRD 8533 yang melalui jalan tersebut.
>
> 4. Hasil pemeriksaan mendapati terdapat 5 orang individu di dalam kenderaan tersebut, yang merupakan 3 orang penumpang warganegara Indonesia yang gagal menunjukkan apa-apa dokumen pengenalan diri yang sah dan 2 orang warganegara Malaysia yang membawa warganegara Indonesia tersebut.

[29] Additionally, we find that the testimonies of the three migrants in their depositions (exhs P15(A), P15(B) and P15(C)) tendered through the investigating officer, PW4 strengthens the prosecution case when the migrants admitted that they have entered Malaysia unlawfully and mentioned the

accused's involvement in conveying the migrants. This is what they said:

> (6) Saya telah berjumpa dengan Bunsu untuk melihat kebun kelapa sawit. Bunsu pernah menawarkan saya untuk bekerja di kebun kelapa sawit tersebut. Namun, Bunsu mahu menunjukkan dahulu kebun kelapa sawit tersebut kepada kami dan sekiranya kami berminat untuk bekerja di situ, Bunsu akan menguruskan passport kami
>
> (7) Kebun tersebut terletak di sempadan Malaysia-Indonesia.
>
> (8) Selepas melihat kebun tersebut, saya telah mengikut Bunsu dan anaknya ke pasar Lubok Antu dan merupakan pertama kali tiba di situ.
>
> (9) Saya telah mengikut Bunsu dengan rela hati tanpa paksaan sambil membeli belah di sebuah kedai yang dikenali dengan nama 'Doraemon'. Setelah itu, Bunsu dan anaknya menghantar saya, suami dan Nani pulang ke sempadan dan telah ditahan oleh tentera di sebuah jalan tikus di Lubok Antu.
>
> (10) Saya mengaku tidak mempunyai apa-apa dokumen pengenalan diri yang sah ketika memasuki Malaysia kerana beranggapan bahawa saya hanya melawat ke kebun tersebut sebentar sahaja.

[30] From the above disposition statement of the migrants coupled with the evidence of others prosecution witnesses, we find sufficient evidence to show that the accused persons were actively involved in conveying the three migrants into Malaysia via illegal route. It is also pertinent to emphasise the accused and the three migrants were arrested 400–500meters away from the Malaysia-Indonesia border.

[31] The learned counsel for the accused submitted that the three migrants in their depositions did not implicate or ever mentioned that the two accused had smuggled the three of them into or out of the country as all three of them have voluntarily entered this country. Hence, no offence being committed by the two accused.

[32] With respect, we are not persuaded by such argument. The act of the accused in transporting and conveying the three migrant falls clearly within the definition of 'smuggling of migrants' which means:

> (a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful and
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a);

[33] Here again, we find ample evidence connecting the two accused with

the crime. From the evidence adduced, inference can be drawn that both the accused knew that the migrants' act of entering and exiting Malaysia were via illegal route and the meeting at the estate was a pre-arranged plan orchestrated by both the accused. If it is not because of the work employment opportunity offered by the second accused and the inducement and promise made by the second accused that she will arrange their passport if the migrants agree to work with her at the said palm oil estate, the migrants would not have agreed to entered Lubok Antu, Sarawak unlawfully. The assistance given by the accused conveying them for easy movement in Lubok Antu area further strengthens the prosecution case that the accused had directly engaged in conveyance of the smuggled migrants by using the said vehicle.

[34] Additionally, even though the three-migrant admitted in their depositions that they had voluntarily entered Malaysia but that they do exonerate the two accused from the offence committed. This is because voluntariness/consent is not one of the elements to be proven for an offence under s 26J of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. Hence, the issue of consent is immaterial to this honourable court. To this, perhaps we should add that regardless of the reasons given by the migrants, it certainly does not legalise their act of entering Malaysian border without any lawful documents and the accused conduct of conveying them into Malaysia without proper and lawful means.

COMMON INTENTION

[35] Section 34 of the Penal Code is a rule of evidence and does not create a substantive offence. Common intention is a question of fact. The proof of common intention is the matter of inference from the circumstances. Mens rea being a mental element or state of mind is not usually capable of being established by way of direct evidence. It can be gathered from indirect evidence in each particular case. It can also derive from the conduct of the accused. See *Public Prosecutor v Roslizam bin Abdul Azis & Anor* [2005] 1 MLJ 261; [2004] CLJU 196; [2004] 1 LNS 196, *Public Prosecutor v Azman bin Ismail & Ors* [2007] 10 CLJ 469; [2007] 3 MLJ 628, *Public Prosecutor v Norazam Ibrahim* [2006] 8 CLJ 462 and *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603.

[36] Justice Hashim Yeop A Sani J (as he then was) in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 at p 267 (MLJ); 749 (CLJ) held as follows:

> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct

A or other relevant circumstances of the case (see *Mahbub Shah v King Emperor* (1945) 72 IA 148 153).

Then, His Lordship continued:

B Thus, it is clear that the leading feature of s 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfil the requirement of s 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is
C logical because how can there be participation without physical presence. Even passive participation may require physical presence.

[37] In somewhat similar situation, the Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987]
D 2 MLJ 336; [1987] 1 CLJ 540 speaking through Syed Agil Barakbah SCJ (as he then was) set out the law to be applied on the question of common intention. The words still ring in our ear where His Lordship said (at pp 344–345):

In law, common intention requires a prior meeting of the minds and presupposes
E some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was: (a) a common intention to commit the very offence of which the accused persons are sought to be convicted; and (b) participation in the commission of the intended offence in furtherance of that common intention.

F Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common
G intention may be inferred from the facts and circumstances of the case and the conduct of the accused (see *The Supreme Court (of India) on Criminal Law 1950–1960* by JK Soonavala p 188–193).

[38] In *Farose bin Tamure Mohamad Khan v Public Prosecutor & other*
H *appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769 where Raus Sharif PCA (as he then was) delivering the judgment of the Federal Court said at pp 294–295 (MLJ); 788–789 (CLJ):

[47] It is helpful to analyse s 34 in terms of these elements:

I (a) a criminal act;

(b) participation in doing of the act;

(c) a common intention between the parties; and

(d) the act must be done in furtherance of the common intention.

[48] At this juncture, it is convenient first to address the generally accepted principles on the operation of s 34. The position in respect of these elements is fairly uncontroversial, and the relevant principles gleaned from the authorities in Malaysia, Singapore and India can be briefly dealt with.

[49] It is widely acknowledged that s 34 is a rule of evidence which embodies the common-sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually (*Krishna Rao a/l Gurumurthi v Public Prosecutor & Other Appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603).

[50] If it is shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone (*Mahbub Shah v Emperor* AIR 1945 PC 118).

[51] The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them (*Hari Ram v State of Uttar Pradesh* [2004] 8 SCC 146). In those circumstances, the law makes no distinction between them or between the parts played by them in doing the criminal act (*Bashir v State* AIR 1953 All 668).

[52] Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466 and *Manikumar Sinappan & Ors v Public Prosecutor* [2015] MLJU 1956; [2016] 3 MLRA 1.

[53] Common intention, distinguished from the same or similar intention, requires proof that the criminal act was done in pursuance of a pre-arranged plan (*Mahbub Shah*). Such pre-planning may develop on the spot or in the course of commission of an offence, the crucial test being the plan must precede the commission of the offence (*(1)Namasiyiam (2)Rajindran (3)Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336).

[54] A common intention may be often be difficult to prove by way of direct evidence in practice, but it can be inferred from the circumstances of the case and the conduct of the accused (*Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101).

[66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because common intention is essentially a state of mind. Invariably inferences have to rely upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.

[39] Having laid down the principles of law on s 34 of the Penal Code, we will now come to the main issue which is crucial to the accused case ie whether the accused had the common intention of transporting the migrants. In the instant appeal, we accept that it is virtually impossible to directly prove a pre-arranged plan between the accused. The best evidence to establish common intention is to look at their conduct prior to, at the time of and after the offence. All these acts when combined together proved their nexus to the offence, stands.

[40] This inference of their involvement can be gathered from the following evidence:

(a) from PW's testimony, his vehicle was borrowed by the first accused and used by the him on 21 July 2019 to enable him to travel on a rough road to the oil palm estate with the second accused;

(b) both the accused were caught in action while conveying the smuggled migrants and being the operator of the said vehicle; and

(c) the meeting between both the accused and the migrants took place at the oil palm estate. They were not there but accident or coincidence.

[41] In the upshot, there was more than credible evidence that can be inferred that the accused acted in concert in the commission of the offence in furtherance of that common intention.

[42] Moving on, we will now take the final argument made by learned counsel. This arose from accused persons complained that the learned trial judge had misdirected himself when he failed to adequately appreciate the defence of the accused. In addition, it was further contended that the learned trial judge has seriously erred when he erroneously failed to consider thoroughly the depositions made by the three migrants at the end of prosecution case and had he done so he would have acquitted both the accused without calling for their defence.

[43] With respect, this ground of appeal has no merits. To fortify this finding, we can do no better than refer to the learned trial judge' discussion on this issue. This is what he says:

> [30] ... It is clear, based on the evidence of PW3, the three migrants have no records of lawful entry or lawful exit to or from Malaysia. Further, PW4 also testified that the migrant named Karwono was charged under s 6(1)(c) of the Immigration Act 1959/63 for illegal entry and two other females migrants were deported back to Indonesia. By the phrase 'smuggled migrant', means a person or object of smuggling of migrants. By the phrase 'smuggling of migrants', means an act of arranging or facilitating or organizing a person's unlawful entry into or unlawful exit from a country of which the person is not a citizen. It also includes conveying the migrants

for the purpose of carrying out the acts of arranging, facilitating or organizing above (s 2 of the ATIPSOM 2007). Applying this definition to the facts of our case, it is proven that the migrants entered Malaysia unlawfully through an illegal route without a valid pass. It is also proven that the meeting was pre arranged for the migrants to view the estate prior to work employment. If the migrants agreed to work after being shown around the estate, then DW2 would help them out with the passport. The migrants were also conveyed in the Toyota Hilux to exit from Malaysia through an illegal route near the estate to the Malaysian-Indonesian border (which is also the route used by the migrants to enter Malaysia) and this is not the legal and valid ICQS checkpoint.

[31] Based on the evaluation of all the evidence in totality and the evidence of the migrants via depositions, it pointed to the conclusion that both accused had knowledge and reason to believe that the migrants' entry to Malaysia is unlawful. The place of the arrest of both the accused and the migrants is about 400–500m from the Malaysian-Indonesian border. It defies all reasoning and truth that both the accused had no knowledge of that area around the oil palm estate when they claimed that the estate belonged to them located near to the Malaysian-Indonesian border. Further, DW2 claimed that the place of arrest is also the route she used whenever she goes to the estate. Both accused also agreed that the route does not lead to any ICQS checkpoint which only means that such a route is an illegal point of entry or exit into and from Malaysia and therefore not a valid checkpoint.

[32] On the issue of the prosecution's failure to prove that the migrants were being forced to follow both accused to-and-fro Lubok Antu inside Toyota Hilux, the definition of 'smuggled migrant' under s 2 of the ATIPSOM 2007 does not require any proof of whether the migrants were participating or otherwise in the act of smuggling of migrants. In fact, the issue of consent of the smuggled migrants is rarely discussed in the case of smuggling of migrants as most often in such cases, the smuggled migrants allowed themselves voluntarily to be conveyed by the offender or the accused. Likewise, in the present case, the migrants followed both accused on their own free will. In my view, based on the provision of the law, particularly on the definition of 'smuggled migrant' under s 2 of the ATIPSOM Act, consent of the smuggled migrants is not the central issue in determining whether the elements under s 26J of the ATIPSOM 2007 has been fulfilled.

[33] On the issue of no payment that been transferred from the migrants to both accused for the conveyance, s 26J of the ATIPSOM 2007 does not require the prosecution to prove this element to bring home the charge for this offence. What is material is that both accused engaged in conveying smuggled migrants in the Toyota Hilux and both accused knew or have reason to believe that the migrants' entry or exit were unlawful.

[34] Upon hearing the defence, I find that the evidence given by both the accused were rather inconsistent and contradictory. For instance, the first accused (Davis ak Mering) who testified as DW1 initially agreed that the migrants had no valid travelling document and that he knew and had reason to believe that the migrants had entered Malaysia by using the unlawful route when he and his mother ie the second accused (DW2), first met the migrants at the oil palm estate. When pursued further, DW1 changed his answer by stating that he didn't know whether the migrants had valid documents or not as he just sympathised with them when they

asked to be sent to Lubok Antu to buy some items. He only came to know of their immigration status when they were stopped and arrested by the army who manned the roadblock at Jalan John, Batu Kaya in the district of Lubok Antu.

[35] If DW1 already knew that the migrants had entered Malaysia through unlawful entry when they met at the oil palm estate, surely, he also knew of the migrant's status at the time when the migrants asked both the accused to send them to Lubok Antu as alleged and the existence of knowledge continues at the time when they were arrested at Jalan John, Batu Kaya. This is because the event when they met at the oil palm estate occurred much earlier and prior to the event of shopping at Lubok Antu as well as when the arrest was made on that day.

[36] The evidence of DW1 is also inconsistent with that of DW2 on some material points which would show that their defence is just a mere denial. DW1 agreed to the suggestion of the prosecution during cross-examination that the migrants were offered a job at the oil palm estate by DW2 and the purpose of the meeting is for the migrants to view the estate before they could decide whether to take up the job or not. DW2, however, disagreed that she ever made the offer to employ the migrants. In the same vein, she agreed that the migrants were at the estate to have a view on the estate before deciding to work there. If there is no offer of employment by the second accused, the migrants would not have gone straight to the estate allegedly owned by the second accused and viewed the condition of the estate accompanied by both the accused. If the migrants, later on, agree to work, the second accused would then make arrangements for their proper travel documents which would also indicate the second accused's knowledge that the migrants had no travel documents and the meeting was a pre arranged one.

[37] Having considered all the evidence, it is my view that there was a pre-arranged meeting between the migrants and both the accused at the oil palm estate. It cannot be a mere coincidence as the migrants especially Salbiah was known to the second accused. Both the accused must have knowledge that the migrants were illegal immigrants without travelling documents when they conveyed the said migrants back to Indonesia on the evening of 21 July 2019 via Jalan John, Batu Kaya which route does not lead to any legal ICQS checkpoint.

[38] The migrants would not have entered Sarawak unlawfully through 'Jalan tikus', if not because of the employment opportunity offered by the second accused and further, at the risk of repetition, the migrants would not be able to move within or around Lubok Antu area if not for the assistance of both the accused in conveying them in Lubok Antu using the said vehicle Toyota Hilux despite their knowledge of the unlawful entry and unlawful exit of the migrants without a valid travelling pass.

[39] Although the offer for employment to the migrants was made by the second accused, it was facilitated by the first accused and he had acted with common intention as he was the one who borrowed the said Toyota Hilux from his brother-in-law, PW1, to enable him to travel on a rough road to the oil palm estate with the second accused.

[40] Based on all the above grounds and having considered all the evidence before me at the conclusion of defence case, I find that the prosecution has proven its case beyond reasonable doubt. In the result, I find both the accused guilty of the offence

as per charge and convict them accordingly.

[44] A scrutiny of the said judgment revealed that he had judicially considered the defence advanced by the accused persons and weigh all their evidence including the depositions statements of the three migrants before coming to a definite finding of fact.

[45] It is clear from the judgment that learned trial judge had addressed his judicial mind to the defence, placed significance emphasis to it, meticulously considered their versions and adequately explained why he chose to disbelieve the evidence of the defence.

[46] Again, on the facts and evidence analysed by the learned trial judge, we do not see how he can be said to be wrong. The learned trial judge was right when he finally makes a strong finding of fact that the defence to be a mere denial and has not been able to raise any reasonable doubt in his mind. He had the advantage of seeing and hearing the witnesses. In this situation, we are very mindful of our limitation sitting on an appellate capacity reading the record and without the benefit of oral testimony. We see no reason why we should interfere with his finding of facts. We do not find any infirmities in the decision of the learned trial judge.

CONCLUSION

[47] The findings were premised on the credibility of witnesses which is within the domain of the trial judge. For the reasons that we have given, we unanimously find that the conviction of both the accused safe and we accordingly dismissed the appeal and affirmed the conviction.

[48] On the issue of sentence, it is obvious that the seriousness of the crime committed by the accused must never be taken lightly. We find that the aggravating factor outweighs the mitigating factors. We were not satisfied that the sentences were wrong either in law or that they were manifestly excessive or inadequate on the facts and in the circumstances of the case. Hence, we unanimously affirmed the sentence meted out by the trial judge.

[49] Warrant of committal to be issued. Bail to be refunded. The sentences of imprisonment for the period of three years is to run from today (6 February 2024).

A *Conviction and sentence affirmed.*

Reported by K Selvaraju

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